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International Constitutionalism

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I. Introduction

International law has always been conceived as a project involving sovereign and equal states, who would be forever locked in battle with each other – if not literally, then at least metaphorically. The international legal order, such as it is, was always conceptualized as a horizontal order, mostly geared towards facilitating the co-existence of states, and with scant attention for planetary unity, or even for the interests of individual human beings. International law was made by states, to regulate relations between states, and for the benefit of states. What happened within those states was long considered anathema, and nothing was supposed to exist above those states.

If this has always and invariably been the dominant strand in conceptualizations of the global legal order, eventually to be confirmed by the Permanent Court of International Justice in some of its classic decisions, individual thinkers through the ages have nonetheless occasionally dared to dream of something bigger. Grotius, for one, dreamt of collective security, of a legal order that would distinguish between just and unjust wars and collectively punish the wrongdoer. Christian Wolff posited the existence of a *civitas maxima*, a world government with authority over states. Immanuel Kant, worried about the possible tyrannical side of world government, posited a confederation of republics as the recipe for eternal peace, a stand which at least presupposes peace as a legitimate *telos* for the society of states, as opposed to the proto-Darwinian (or Hobbesian) struggle of all against all.[2]

But such dreams notwithstanding, for all practical purposes international law long remained a system of rules created by, between and for equals enjoying the

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[2] For a fine overview, see Mark Mazower, *Governing the World* (London: Allen Lane, 2012).

status of sovereignty, serving no higher goals than the peaceful (if at all possible) coexistence between those same states. Some may have identified a connection to the domestic law of those states, and Wolfgang Friedmann may have famously posited that the law of co-existence was in the process of being joined by a law of co-operation[3], but until the late 1960s, early 1970s, these changes were little more than window-dressing.

During the 1960s, however, some states started to think that there might be some norms which were simply intransgressible, and formalized this into the idea of *jus cogens* norms: some norms exist from which no derogation is permitted.[4] The International Court of Justice added, in 1970, the idea that there exist norms which affect the legal interests of all states: these give rise to so-called *erga omnes* obigations.[5] And less than a decade later, people had started to think it might be possible to distinguish between state torts and state crimes.[6] It never became very clear what either of these developments meant, and the tort-crime distinction rather rapidly proved difficult to operationalize, but somehow the seeds had been planted. *Jus cogens* norms, *erga omnes* obligations, and state crimes, they all presuppose something of a hierarchical, vertical element in the order that had traditionally been made up of sovereign equals, and had been based on the consent of those sovereign equals.

These seeds would come to fruition for a brief period, roughly the first decade of the new millenium, with many proclaiming the constitutionalization of international law, either as an ontological reality or at least as a desideratum. For about a decade, the putative constitutionalization of international law captured the interests of international lawyers – for reasons to be discussed, below, in section II. Sections III to VI discuss different manifestations of thinking

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[3] See Wolfgang Friedmann, *The Changing Structure of International Law* (New York: Columbia University Press, 1964).

[4] The concept came to be solidified in Article 53 Vienna Convention on the Law of Treaties.

[5] See *Case Concerning the Barcelona Traction, Light and Power Company*, (Belgium v Spain), second phase, (1970) ICJ Reports 3.

[6] Most notably the International Law Commission. For discussion, see Nina Jorgensen, *The Responsibility of States for International Crimes* (Oxford University Press, 2000).

about constitutionalization; section VII provides a view of the field after the smoke has cleared, while section VIII concludes.

II. The Setting

Perhaps inspired by millennial Angst, during the first decade of the twenty-first century many international lawyers explored the possibilities of and for international constitutionalism. The reasons for doing so were varied and manifold. For some, constitutionalism was merely the obvious next step, following the fall of the Wall and the proclaimed 'end of history': a liberal world order required, or mandated, a liberal international constitutional order, and with human rights and democracy firmly in place - or so it seemed from a Western European vantage point, a good few years before Trump and Erdogan - it made sense to complete the Enlightenment project: global peace through a global constitutional order. There may have been faint echoes of 1950s rallying cries here ('world peace through world law'), but nonetheless, if ever, this was the moment.

Others, more pragmatic perhaps, saw in constitutionalism a response to the much-feared image of the fragmentation of international law: if the domains of international law were becoming increasingly independent and international environmental lawyers could no longer communicate with international trade lawyers, then something was required to bind them together, and what could be more obvious and beneficial than international constitutionalism? In an international constitutional order, trade law and environmental law would both be part of the same overarching system and, so the argument implicitly continued, both be subject to the higher goals of the international community – although what exactly those higher goals were was usually, wisely perhaps, left unspecified.

And for yet others, worried about the risks and dangers posed by unfettered globalization, constitutionalism provided something of a political response: if globalization was ideology, used to sell political projects of exploitation to influential Western elites, then something of a counter-ideology was required, and constitutionalism could fit the bill.

The story of international constitutionalism can be told in a variety of ways, but it is important to realize that there is no constitutionalization going on without a story, a larger narrative that places disjointed occurrences into a single coherent whole. One way to tell the story is to focus on concrete legal developments: the emergence of notions such as *jus cogens* norms or *erga omnes* obligations in international case-law; or the rise of human rights after the Second World War; or the post-war mushrooming of international organizations and multilateral agreements; or the increase in the number of international courts and tribunals since the 1990s. All of these can be seen as markers of constitutionalism for those wishing to see them as such; indeed, *jus cogens* becomes a feature of constitutionalism only for those who look at the world through constitutionalist lenses; those who refuse to don such spectacles may think of *jus cogens* as an aberration, or as a harbinger of future developments, or even simply as political correctness.[7]

This suggests that much depends on how international constitutionalization is conceptualized by proponents and discontents alike. There is no single, generally agreed and accepted notion of international constitutionalization available: instead, it seems that every author has used his or her (surprisingly often her, given the still overwhelmingly male composition of international law academia) own vocabulary, based on his or her own insights and intuitions and background understandings – not to mention his or her own value-systems. Hence, the current chapter discusses those authorial interpretations, not so much to search for common denominators, but rather in order to highlight what international constitutionalization was, and is, and could be, all about. This also entails that I am hard-pressed to adopt standard definitions: much depends, after all, on how various authors have employed various terms. Nonetheless, I will generally distinguish between the material process of constitutionalization and the idea of constitutionalism.

International constitutionalization and constitutionalism manifested themselves predominantly in four broad strands in the literature. First, there were those who observed or endorsed constitutionalization as a process, taking place in

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[7] This owes something to Friedrich V. Kratochwil, *Rules, Norms, and Decisions* (Cambridge University Press, 1989).

international law broadly conceived, and in various ways – I will refer to them as the cosmopolitans. A second group thought of constitutionalization primarily in connection with specific international organizations: the institutionalists. A third group shifted attention away from full constitutionalization to a more modest and less demanding strand, concentrating on administrative control and, in the process, filling a gap curiously left wide open by most constitutionalist proposals: few of these proposals occupied themselves meaningfully with control of public authority. For this group I coin the neologism administrativists. Finally, some proved more skeptical, and suggested that full-fledged constitutionalization might not work or would be undesirable (or both), but nonetheless borrowed elements deemed normatively commendable – the skeptics. In what follows, I will discuss these four strands, mindful of the circumstance that boundaries between the various groups of authors were porous and fluid, so much so that some authors – including myself - can be placed in more than one group. I will finish by taking stock of what is left of the debate, for a curious characteristic is that it seems to have disappeared just as rapidly as it burst on the scene - the intellectual equivalent of a one-hit wonder. On the other hand, it is not impossible that while it has changed its colours and its tone, something of a constitutionalization debate still persists.

III. The Cosmopolitans

It is no exaggeration to state most of the international lawyers writing about constitutionalism displayed strong liberal sensitivities. For the likes of Mattias Kumm, Erika de Wet and Anne Peters, for all their differences, constitutionalization has something to do with human rights, with democracy, with rule of law and, for De Wet, also with the market economy. International constitutionalization is also, it seems, a peculiarly German affliction, and has been especially noted in precisely its German manifestations. While others, from other traditions, have written approvingly about international

constitutionalization, their work has been less influential, and markedly different in tone.[8]

There are, one would think, at least three reasons for this Germanic orientation. One is the legacy of the Nazi era, which inspired post-war German international lawyers to adopt a strong liberal orientation. Second, in the absence of a central authority in international law, much of the systematizing in that discipline needs to be done by law professors – and this dovetails nicely with the German tradition of systematization by dogmatic scholarship. Third, Germany's legal academia has traditionally had a strong public law orientation, and constitutionalization thus fell into a fertile tradition; recent antecedents can be detected in the works of Verdross going back to the 1930s[9], but also in Mosler's conception of the international community as a *legal* community rather than, as many non-German contemporaries would have it, an anarchical society.[10] Even Kelsen can be seen as a forerunner: his monism, characterized by the supremacy of international law, hinged on a conception of a global community able to delegate tasks to states and others, and was inspired, as Jochen von Bernstorff has so compellingly shown, by his social-democratic liberalism.[11]

Following this strong tradition, perhaps the *pater familias* of millennarian constitutionalism was Christian Tomuschat, whose 1999 lectures to the Hague Academy set the tone.[12] These lectures were devoted to the survival of mankind, and imbued with an anxiety that could only be relieved by global liberal thought. In addition, Tomuschat wrote and edited tomes about human rights protection by international authorities – which in itself can be seen as a manifestation of constitutionalism – as well as about supreme norms – another manifestation. Tomuschat therewith constructed a careful edifice of a constitutional legal order,

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[8] Examples include the work of French author Pierre-Marie Dupuy, or the very personal constitutionalism of Philip Allott.

[9] See, e.g., Aoife O'Donoghue, 'Alfred Verdross and the Contemporary Constitutionalization Debate', (2012) 32 *Oxford Journal of Legal Studies*, 799-822.

[10] See Hermann Mosler, *The International Society as a Legal Community* (Alphen aan den Rijn: Sijthoff, 1980).

[11] See Jochen von Bernstorff, *Der Glaube an das universale Recht: zur Völkerrechtstheorie Hans Kelsens und seiner Schüler* (Baden-Baden: Nomos, 2001).

[12] See Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', (1999) 297 *Recueil des Cours*, 9-438.

with certain norms for the protection of the individual at the apex, as norms from which no derogation was permitted. All of this, of course, had been floating around for a few decades already, but Tomuschat was arguably the first to systematize and place it in a constitutionalist framework.

Still, other German international lawyers (Bruno Simma, Jochen Frowein, Rüdiger Wolfrum, Jost Delbrück) followed suit, or worked on the basis of similar premises, even if they did not always use the constitutionalist vocabulary. Even those outside the discipline of international law would come to discuss international constitutionalism in one way or another. This applied, for instance, to individuals working in the private law tradition: Christian Joerges posited that private law could exercise constitutional values and functions, while Gunther Teubner used constitutionalism as a prism for discussions of functionally differentiated regimes. Constitutional lawyers too, such as the above-mentioned Kumm, rather naturally extended the reach of their domestic domain to international affairs, and as we will see, even the renowned philosopher Jürgen Habermas came to embrace international constitutionalism.

But possibly the most discussed versions of constitutionalism stemmed from two female authors[13], Erika de Wet and Anne Peters, in two articles published almost simultaneously and, while related, with some crucial differences. De Wet possibly qualifies as the most outspoken proponent of constitutionalism or, as she would say at the time, the constitutionalization of international law.[14] For her, constitutionalization was not a mental structure or a normative project (not just a political dogma) but empirically observable reality – a process that could be, and ought to be, identified: her seminal article confidently discusses the international constitutional order as ontological reality, without question mark.[15]

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[13] This has the risk of confirming gender prejudices of course: the women write about soft topics (constitutionalism) while at roughly the same moment in time the men flock to the hard law of investment arbitration.

[14] For the record, De Wet is not a German national, but has spent time in the German-speaking world, and defended her *Habilitation* thesis at the University of Zürich.

[15] See Erika de Wet, 'The International Constitutional Order', (2006) 55 *International and Comparative Law Quarterly*, 51-76.

Still, for all the confidence of the article, both the premises and the theory could be scrutinized. In particular her catalogue of human rights was question-begging in its embrace of the market economy: while she no doubt had a point in insisting on the prohibition of torture being widely recognized as a human right, the same could not be said about the right to contract, or the right to engage in trade and commerce. Rights these may be, but they are not necessarily recognized as part of any human rights catalogue, and neither do they carry the same normative expectations as the prohibition of torture – or, put differently: if human rights flow from human dignity, the connection to the torture prohibition is a lot easier to make than to freedom of contract or the right to trade. These rights flowed straight from the ordo-liberal hymn-sheet, tapping into a kind of liberalism briefly popular in the interbellum and the years immediately following the Second World War, but rarely endorsed in this particular form. In the end, then, De Wet's constitutionalization thesis found itself at the more extreme end of the political spectrum: read and referred to by many, but not generally considered persuasive.[16]

The work of Anne Peters, by contrast, possesses more traction. The main thrust of Peters' brand of constitutionalism emphasized democracy. In a classic piece, published the same year as De Wet's[17], she suggested strongly that constitutionalism is leaking away at the domestic level – meaning in particular, if not exclusively, that democratic control in the nation-state was no longer viable if decision-making was transferred to international levels. Hence, this leak needed to meet with a response: compensatory constitutionalism. But, as she elaborated a few years later[18], this was not a matter of either/or: in fact, there ought to be, as she called it, a system of 'dual democracy': democracy both

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[16] Her own later writings are more sober in tone: see, e.g., Erika de Wet, 'The Constitutionalization of Public International Law', in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012), 1209-1229.

[17] See Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', (2006) 19 *Leiden Journal of International Law*, 579-610.

[18] See Anne Peters, 'Dual Democracy', in Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford University Press, 2009), 263-341.

domestic and on the international level. And what is more, this is not mere 'ideal theory' but, instead, is slowly but surely materializing. Non-democratic decision-making suffers from a legitimacy deficit that its output, no matter how useful or welcome, cannot compensate for.

Peters has a point, both on normative and empirical grounds – it is difficult to argue against democracy, on any level of decision-making. Indeed, some might think that her fondness of democracy is too limiting: carving a particular, thin concept in stone, makes it more difficult for thicker concepts of democracy to rise to prominence.[19]

If De Wet made a strong empirical claim, a more overtly normative version of international constitutionalization was posited by Kumm.[20] For him, the domestic legitimation of international law was no longer fully available, and thus needed to be replaced by an international constitutional framework. To this end, he posited that the legitimacy of international law would be enhanced through four principles: formal legitimacy (legality), procedural legitimacy (subsidiarity), procedural legitimacy (participation and accountability) and output legitimacy (achieving reasonable outcomes). In doing so he anticipated the work of what I refer to below as the administrativists, although not by much and possibly not by happenstance: being, like some of them, based at New York University may have sensitized him to the need to address in particular participation and acountability in a constitutionalist framework, something that in particular De Wet had never emphasized.

Kumm's approach was also different in another way: he was not interested in sketching an international constitutional order, but rather in sketching and justifying constitutionalism beyond the state – and this was how he explicitly presented his project, thinking of the legal setting not as one with strictly separated 'international' and 'domestic' spheres, but rather as overlapping and cross-cutting 'legal practices'. In this sense, as I will argue below, he also

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[19] The seminal representation of such an argument, pre-dating Peters' work, is Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press, 2000).

[20] See Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework for Analysis', (2004) 15 *European Journal of International Law*, 907-931.

foreshadowed more current manifestations of international constitutionalization, which take the existence of overlapping legal spaces as their starting point.

IV. The Institutionalists

a. The EU

If one might think that constitutionalization of the international order is, well, a tall order, there might be solace in looking forward to the constitutionalization of bits and pieces thereof, and typically, such is operationalized by looking at specific international organizations. This is not a particularly German affectation, although Germans have played a prominent role here as well, and quite possibly the first to approach the matter had fled from German occupation of his native Czechoslovakia: Eric Stein. Stein wrote what must have been the first piece on the constitutionalization of the EU (then still the EEC), noting that the Court of Justice of that organization played a strong constitutional role: it had posited that EU law was directly effective in the member states; that EU law was superior to member state national law; and that the EU could boast implied powers in the external sphere. All this added up to far more than a regular international organization.[21]

Stein was right, of course, although one may question whether the process he observed was well-served by referring to it as 'constitutionalization'. In a sense, this unmasked the poverty of the legal-political vocabulary, itself reflective of the limited nature of political imagination. The EU was constitutionalizing in that it could no longer plausibly be regarded as a mere contractual undertaking between fully independent member states (even if the member states are generally thought to remain, in ironic German, *Herren der Verträge*), but its constitutional structure showed fairly little resemblance to that of the constitutional state – Stein's interest was in describing the solidification of the EU rather than discussing controls on exectuve authority or other staples of

[21] See Eric Stein, 'Lawyers, Judges and the Making of a Transnational Constitution', (1981) 75 *American Journal of International Law*, 1-27.

constitutional thought – and that suggests a radically different notion of 'constitutionalization'.

What is more, in this limited sense a great many international organizations can be considered 'constitutional': in many international organizations, the executive organ plays a role of its own, and in many, the accepted sphere of action includes implied powers. Still, it would be decidedly unorthodox to pin the label 'constitutional' on, say, the Universal Postal Union, or the International Olive Council, or the European University Institute.

Nonetheless, a lively and long-lasting debate ensued on how constitutional the EU was, and whether it should have a formal constitution, and whether such a constitution could take the form of a treaty between member states to begin with.[22] More to the point though, some started to investigate whether other organizations could somehow be seen as constitutional, and attention focused on two such organizations: the newly created World Trade Organization, and the well-established United Nations.

b. The WTO

The constitutionalization of the WTO had been posited, in various ways and, it seems, varying degrees, by seasoned trade lawyers such including Ernst-Ulrich Petersmann.[23] Ordo-liberal in outlook, he based himself on the integrative workings of the CJEU, which had observed that the right to trade and the right to contract were fundamental rights. These now were exemplified most of all in the WTO. Hence, an argument could be made that the WTO was protecting and stimulating fundamental rights and, *ergo*, could thus be seen as a constitutional order, however embryonic perhaps. It would, moreover, also deliver the goods associated with (ordo-)liberal constitutionalism: the WTO, by insisting on the freedom to trade and contract, would increase global welfare, and that would be good for everyone. As the slogan goes: a rising tide lifts all boats.

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[22] See J.H.H. Weiler, *The Constitution of Europe* (Cambridge University Press, 1999); Gráinne de Búrca and J.H.H. Weiler (eds.), *The Worlds of European Constitutionalism* (Cambridge University Press, 2012).

[23] See e.g. Ernst-Ulrich Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of the World Trade Organization', (2002) 13 *European Journal of International Law*, 621-650.

It was here, naturally, that critics started to object: a rising tide may lift all boats, but the analogy is deceptive, in that some boats are likely to be lifted higher than others. All legal rules and institutions have distributive effects, and Petersmann's, so it was feared, would rapidly make the rich richer and the poor poorer. His outlook was unmasked as blatantly free-market oriented, with little regard for other values that some may deem constitutional: solidarity, equality, or the entire catalogue of social and economic rights. Plus, there remained the unanswered question as to who would be responsible for the constitutionalization process. The most obvious candidate would be the WTO's member states (these were *Herren des Vertrags*, after all), but this seemed unlikely: if so, they could have created a constitutional order from the start, rather than set in motion a process. Moreover, a large number of those member states cannot claim internally to be liberal, or democratic, or even much more than nominally market-oriented, and the accession of China and Russia would do little to change this.

Hence, one would have to look elsewhere for the engine of the constitutionalization process, and in a pioneering article Deborah Cass suggested that this engine consisted of the dispute settlement mechanism of the WTO: its panels and especially its highest judicial organ, the Appellate Body.[24] Yet, upon closer scrutiny, Cass retreated considerably: in her monograph published a few years[25] later she took distance from her earlier views, and suggested that there was not all that much constitutionalization going on in the WTO. Much of this change of heart stemmed from having adopted a different, more comprehensive and demanding, notion of constitutionalization. If the earlier article assumed constitutionalization as a means for addressing some particular concerns (including the WTO's own position), the later monograph viewed constitutionalization more on a par with domestic constitutional thought, highlighting such issues as inclusiveness of participation, political community,

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[24] See Deborah Cass, 'The Constitutionalization of International Trade Law: Judicial Norm-generation as the Engine of Constitutionalization', (2001) 12 *European Journal of International Law*, 39-77.

[25] See Deborah Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy and Community in the International Trading System*, (Oxford University Press, 2005).

and deliberation. And on such a conception, there is all of a sudden a lot less constitutionalization visible in the WTO.

c. The United Nations

The most well-known version of organizational constitutionalism is, in fact, a combination of the institutional and cosmopolitan versions. The German scholar Bardo Fassbender, currently a law professor at St. Gallen in Switzerland, published a famous piece in 1998 in which he suggested, invoking the German tradition, that the UN Charter was best seen as constitution for the international community.[26] The claim therewith contains two distinct sub-claims, although these remained largely implicit: first, that the international order has a constitution, known as the UN Charter; and second, the claim includes the sub-claim that the UN, as an organization, must be viewed as constitutional. Fassbender's argument was picked up and endorsed by none other than Habermas[27], and indeed it contains a few plausible elements. Thus, if the hallmark of constitutions is that they are hierarchically superior to ordinary law, the same applies to the Charter, by virtue of the supremacy clause of article 103. And if constitutions usually apply to all within the same political community, article 2(6) of the Charter displays a similar ambition, although in terms more guarded than Fassbender suggests perhaps: the provision calls upon the cooperation of third parties, but does not (and cannot) order such cooperation. On other points, Fassbender's claim was less plausible, even within its own four corners. For instance, the suggestion that the drafters of the Charter chose the term Charter precisely because it referred to a constitution and no similar term was available, is historically untenable. If nothing else, they could have just referred to their instrument as a 'constitution', without needing to resort to the term 'charter' – indeed, the constitutive instruments of some other organizations are called 'constitution'; the World Health Organization, a contemporary of the UN, is an example.

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[26] See Bardo Fassbender, 'The United Nations Charter as the Constitution of the International Community', (1998) 36 *Columbia Journal of Transnational Law*, 529-619.

[27] See Jurgen Habermas, *The Divided West* (Cambridge: Polity, 2006).

More important though than these cosmetics is how Fassbender conceptualized his constitution. It turned out that Fassbender's constitution does little by way of separation of powers and says nothing at all about the accountability of the UN and any of its organs. If one of the functions of a constitution is to place limits on the exercise of public power, as many would agree, then the UN Charter à la Fassbender is a very, very relaxed example of constitution: it does not limit the UN's activities in any way and, on at least one reading of the Charter, does not even limit the scope of activities of the supreme international public organ, the Security Council. In the end, then, Fassbender's constitutionalism is in effect a hyper-functional concept[28], allowing the UN to do as it pleases, without placing any limits on the scope and reach of public power. And if the UN were deemed constitutional in theory, one cannot escape the practical observation that much of what it does would be difficult to reconcile with any version of constitutionalist thought: if the UN is considered to be 'constitutional', one can only reach the conclusion that much of what does is actually 'unconstitutional' – and how helpful is that?

V. The Administrativists

As transpired from the above, most versions of international constitutionalism suffered from two major blind spots. First, much constitutional thought was modeled, explicitly or implicitly, on Western values. That is not surprising, of course; it would be much more surprising if Western scholars would not reflect Western values. It would be problematic if the Western-born plans would result in global domination, yet that is something that is less easily demonstrated. The critique that such projects are neo-colonial or Western-dominated is a bit facile, but it does have bite – politically, such allegations are often enough to kill off any ambitions a project may have.

Second though, and much more surprising given the usual associations that come with the term 'constitution', few of the constitutionalist proposals pay much

[28] See Jan Klabbers, 'Functionalism, Constitutionalism and the United Nations', in Anthony Lang, jr. and Antje Wiener (eds.), *Handbook on Global Constitutionalism* (Cheltenham: Edward Elgar, 2017).

attention to the control of public authority. Yet, if there is one single normative element to constitutionalism, it is the idea that public power should be kept in check: this is the hallmark of one of the foundational texts of constitutionalism, the Federalist Papers.[29] A constitution, in other words, is expected to include provisions on the organization of public power, and therewith also on limits on the exercise of public power – even if only in terms of a separation of powers. Yet, as noted, much of the constitutional discourse related to specific international organizations was geared towards solidifying the position of the institution in question, while the more general constitutional discourse of the cosmopolitans posited the existence of universal values (with greater or lesser cogency) but, in most versions, was never explicit about controlling public power. Peters' work, with its emphasis on democracy, comes closest, but at best represents an important exception rather than the rule. Thus, one might say that international constitutionalism collapsed under its own weight: it posited a universalizing project, while closing its eyes for the one thing that would have fit such a universalizing project.

Perhaps in response, several projects aimed to play down constitutionalism's 'conceits'[30] and relied on an administrative law approach instead. This had two distinct advantages (at least) over international constitutionalism, or so it seemed. First, being administrative in nature, it never needed to demonstrate the universality of big political values. All it needed to do was to suggest the universality of certain procedural ideas: the idea that decisions should be reasoned; or the idea that all relevant stakeholders should participate in decision-making affecting them; or the idea that decisions should be proportional. And this, so proponents thought, was much easier to achieve than agreement on whether or not torture would be acceptable in extreme circumstances, or where the limits of free speech should lie. And second, being administrative in nature, it would automatically be concerned (so it was

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[29] See Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, (New York: Bantam, 1982).

[30] See Jeffrey L. Dunoff, 'Constitutional Conceits: The WTO's "Constitution" and the Discipline of International Law', (2006) 17 *European Journal of International Law*, 647-675.

thought) with the control of public power, and perhaps even the control of some manifestations of private power as well.[31]

For ease of reference, two versions will be distinguished. The first became known as global administrative law, and was developed by international lawyers such as Benedict Kingsbury and Nico Krisch, in conjunction with administrative lawyers, including Richard Stewart and Sabino Cassese.[32] It worked on the basis of the posited existence of a global legal space (empirically verifiable), in which decisions are taken which thus (or so it seemed to follow) ought to be subject to some kind of review. These decisions could emanate from public authorities, local as well as international: refugee applications, e.g., can be handled both by domestic authorities and by UNHCR. Sometimes, pertinent decisions can even emanate from private authorities, at least in those cases where private authorities assume public or semi-public functions, or their standards have been adopted by public authority. Thus, GAL scholars have paid attention to private certification schemes as well as to the work of, e.g. international sports bodies.

A second approach was pioneered in Heidelberg, at the Max Planck Institute for Foreign Public and International Law, under the heading of International Public Authority (IPA).[33] Here, the scope was more restrictive: IPA concentrated on public institutions, and aimed to develop a framework for understanding the standard-setting activities of these international institutions, on the basis of the observation that much of this work is done through governance that may not utilize specifically legal instruments, and therewith may escape legal scrutiny. Hence, IPA tried to reconstruct international public governance in public law

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[31] It is for this reason that Anne-Marie Slaughter's work does not fit the bill: while she acknowledges the rise of multi-stakeholder decision-making, she is rather cavalier about issues of accountability. See Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004).

[32] See Benedict Kingsbury, Nico Krisch and Richard Stewart, 'The Emergence of Global Administrative Law', (2005) 68 *Law and Contemporary Problems*, 15-62; Sabino Cassese (ed.), *Research Handbook on Global Administrative Law,* (Cheltenham: Edward Elgar, 2016).

[33] See Armin von Bogdandy *et al*. (eds.), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Heidelberg: Springer, 2010).

terms (often borrowed from administrative law), with the ambition to highlight control.[34]

While GAL in particular proved a hugely popular and successful academic project, not all of its ambitions could be met. For one thing, the posited distinction between procedure and substance, used to justify a procedural perspective, proved difficult to sustain. Proportionality testing, e.g., always involves a substantive choice: something must be tested against something else, and the choice for the 'something else' can have huge political effects. Likewise, it is one thing to claim that decision-making should include the relevant stakeholders, but the choice for the relevant stakeholders in any given procedure is never politically innocent either. Here too, the neo-colonial critique reared its head: the administrative notions relied on were often borrowed from the US or the EU, so how universal were they really? Plus, even the premise proved problematic: for Anglo-saxons, administrative law may function so as to limit public authority; but for some civil law traditions, it functions rather to empower public authority. In response, GAL scholars have done much to clarify what they mean by 'public' and even what they mean by 'law', and have further investigated different techniques of governance, including in particular governance that does not rely on standard instruments (regulations, directives) but instead takes place through indicators.[35]

And then there is the circumstance that if one of the inspirations for re-introducing public law thinking into international law resided in the perceived fragmentation of international law, the administrative approaches do little to overcome fragmentation. GAL works best when it comes to applying norms from a single regime – in such circumstances, proportionality (for instance) may make some sense. But it makes less sense when norms from different regimes are cast against each other, and that is precisely where guidance is mostly needed. How

[34] See also Eyal Benvenisti, *The Law of Global Governance* (The Hague: Hague Academy of International Law, 2014).

[35] Seminal is Kevin Davis *et al*. (eds.), *Governance by Indicators* (Oxford University Press, 2012).

can one decide proportionally between trade and the environment? Or between security and human rights?[36]

VI. The Skeptics

Some of the pitfalls of international constitutionalism were discovered early enough: thus, it was observed that the constitutionalization of different regimes or organizations would only serve so as to deepen political cleavages: instead of pitting rule against rule, it would pit constitution against constitution, therewith making any compromise that much harder to achieve.

The skeptics can, by and large, be divided into two groups, with some overlapping membership, on the basis of whether they look for alternatives within the law or outside of it. Both groups accept that the world is highly pluralist, not merely normatively, in that people may endorse different agendas, but epistemological as well. We do not mean the same things even if we use the same terms, let alone that we can agree on anything substantive. For some, such as Nico Krisch, this meant that lawyers would have to reach 'beyond constitutionalism', and would need to try and devise methods of settling conflicts within and between functional regimes. In a pluralist world, conflicts between norms or regimes would demand a political solution, and the law ought to do as much as possible to facilitate such a solution.[37] Klabbers, in turn, aimed to posit a sources-doctrine for a constitutional global order: under what circumstances can a constitutional global order accept normative utterances as law?[38] In order to achieve this, he suggested a 'presumptive positivism': normative utterances should be regarded as (international) law unless the reverse could be demonstrated.

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[36] See Friedrich V. Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge University Press, 2014).

[37] Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, 2010).

[38] See Jan Klabbers, 'Law-making and Constitutionalism', in Klabbers *et al*., note 18 above, 81-124; see alo Jan Klabbers, 'International Legal Positivism and Constitutionalism', in Jörg Kammerhofer and Jean d'Aspremont (eds.), *International Legal Positivism in a Post-Modern World* (Cambridge University Press, 2014), 264-290.

Others, however, doubted whether the law could do much work here, although they accepted that much of the work to be done was to be done by lawyers, utilizing their expertise when acting in a decision-making capacity. It followed, that much would come to depend on how those individuals would come to utilize their expertise. Koskenniemi suggested that the one thing worth saving from a duty-based constitutionalism was the mindset: lawyers ought to realize that when making decisions, they ought to mindful of the effects of their actions, and give effect to a 'culture of formalism'.[39]

Klabbers had likewise suggested, early on, that the most proper constitutionalism would be a 'constitutionalism lite'[40], and later fleshed this out more explicitly in terms borrowed from Aristotelian virtue ethics. This approach accepts the premise that the application of legal rules always involves a human element: rules do not decide on their own application, or how they shall be interpreted, or whether the exception is applicable – all this involves human intervention, and thus there is merit in thinking about what sort of individual gets to apply the law. It may make a difference, for instance, beyond differences in technical competence, whether legal officers are courageous or not, humble or not, or honest or not, even if notions of honesty or humility or courage may differ across time and space. And emphatically, it may matter whether they are compassionate, or display empathy.[41]

VII. The Current State of Affairs

After the broad and intense debates in the first decade of the twenty-first century, the discussion on international constitutionalism seems to have calmed down considerably. Looking back, it seemed that the debate received several final contributions in the forms of a volume edited by Tsagourias, a study by

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[39] See Martti Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization', (2007) 8 *Theoretical Inquiries in Law*, 9-36.

[40] See Jan Klabbers, 'Constitutionalism Lite', (2004) 1 *International Organizations Law Review*, 31-58.

[41] See Jan Klabbers, 'Doing Justice: Bureaucracy, the Rule of Law and Virtue Ethics', (2017) 6 *Rivista di Filosofia del Diritto*, 27-50.

Klabbers, Peters and Ulfstein and a volume edited by Dunoff and Trachtman[42], after which the caravan of international lawyers moved on to different matters, symbolized in the title of Krisch's work: *Beyond Constitutionalism*. And once the caravan had moved on, it became time to reflect not on constitutionalization itself, but on the debate that had taken place: several of the post-2009 contributions aimed to make sense first and foremost of that debate.[43] To the extent that the debate itself is still engaged in, it seems to have been taken over by political theorists.[44]

Perhaps the parochial, Western foundations espoused by many international constitutionalists has come to place constitutionalism in a bad light; perhaps the belated discovery by international lawyers of a principle of systemic integration, laid down in the Vienna Convention on the Law of Treaties, has eased many worries about the fragmentation of international law; perhaps the rejection by Dutch and Frech electorates of the EU constitution has slowed down the discussion even in EU circles (note though that much of the rejected constitutional treaty has found its way, uncontroversially, in the Lisbon Treaty: a constitution in all but name); and if it is true, as it seems, that globalization is less popular these days, it stands to reason that there is less need for an antidote in the form of international constitutionalism.

That said, international constitutionalism has not disappeared altogether, but it does appear to have changed some of its colours. Perhaps the most remarkable

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[42] See Nicholas Tsagourias, *Transnational Constitutionalism: International and European Perspectives* (Cambridge University Press, 2007); Jan Klabbers *et al*., note 18 above, and Jeffrey L. Dunoff and Joel Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009).

[43] See Christine Schwöbel, 'Situating the Debate on Global Constitutionalism', (2010) 8 *International Journal of Constitutional Law*, 611-635; O'Donoghue, note 9 above.

[44] See Jean Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge University Press, 2012); Turkuler Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State* (Oxford University Press, 2016). It is possibly no coincidence that a recent overview is edited by two political theorists: see Lang and Wiener, note 28 above.

development has been the creation of two relevant journals.[45] The first of these is the *International Journal of Constitutional Law*, first published in 2003 and especially inspired by the dual circumstance that constitutional norms were globalizing and comparative constitutional law was considered to be on the rise. Its editorial policy does not sharply distinguish, as it could have done, between the internationalization of constitutional law on the one hand and the constitutionalization of international law on the other hand, and neither does the more recently created, and intimately related, International Society of Public Law.

The second and more specifically dedicated journal is titled *Global Constitutionalism*, edited by an interdisciplinary mix of lawyers and political scientists. Remarkably, the latter journal saw the light not at the crest of the constitutionalist wave, but when the wave had already receded, in 2012, and this circumstance alone suggests that there is something fundamental about international constitutionalization that renders it more than just another academic fad or fashion.

That 'something', however, does not appear to be anything grandiose such as the putative constitutionalization of the international legal order. Instead, perusing the table of contents of the journal suggests it focuses on the philosophical niceties of global constitutionalism, and on comparative constitutional law and politics. There is fairly little talk in its pages about *jus cogens*, hierarchy or, indeed, globalization; but quite a bit of attention for developments in Turkey or Colombia, and for what theorists mean when they speak of 'the people', or of 'judicial review'. And this suggests the making of a second wave, smaller perhaps and less ambitious than its predecessor, but possibly longer-lasting.

This makes sense, if only because, appearances notwithstanding, some of the problems that inspired the earlier wave of scholarship have continued to persist. Public power is still exercised on a transnational level, beyond the reach of most national parliamentarians, and often escaping the reach of judicial organs as well. Private power, moreover, often uses public authorities for its own

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[45] Or perhaps even three, counting the less well-known *Vienna Journal of International Constitutional Law*.

purposes, again often unimpeded, and public authorities outsource tasks to private actors, therewith redistributing social and economic capital.
And to the extent that international constitutionalism owed much to the emergence of the individual – or humanity – as independent carrier of rights and obligations under international law[46], legal issues can be expected to multiply. Put differently, when the legal position of a specific individual is affected by rules coming from different sources and saying different things, some device is needed to decide the situation –and that device can no longer be simpy the claim that one jurisdiction applies and the other does not, or the claim that one is superior to the other. Even if technically that may be the case, deciding cases by technical competence without taking the individual concerned into account is no longer fully acceptable. This is, ultimately, the main lesson (one of many, to be sure) of the *Kadi* case before the CJEU: it suggests that doing justice in individual cases is becoming an inherent element of legal decision-making across boundaries – and this, if anything, may well be characterized as a form of 'constitutionalization from below' and driven by incidental litigation rather than grand design.[47]
Additionally, even if the vocabulary of constitutionalization is no longer fully applied, there remains the strongly felt need to provide global public goods and common goods, ranging from putting a stop to climate change to such things as peace and security, and in these matters the traditional international law vocabulary revolving around state consent is clearly not up to the task. Hence, something else is needed, and that something else may well be a different manifestation of constitutionalism, however 'light' perhaps.[48]

VIII. To Conclude

[46] It is probably no coincidence that Peters has moved on to demonstrate precisely the relevance of the individual (and humanity) for today's international law: Anne Peters, *Beyond Human Rights* (Cambridge University Press, 2016).
[47] See Jan Klabbers and Gianluigi Palombella (eds.), *Inter-legality* (Cambridge University Press, forthcoming).
[48] See Nico Krisch, 'The Decay of Consent: International Law in an Age of Public Goods', (2014) 108 *American Journal of International Law*, 1-40.

International law lacks central authorities, and thus the task of systematizing what otherwise seem like random events and creations falls upon academics. Yet, the absence of central authority also suggests the absence of any specific authorial intent: it is left to international lawyers, or more specifically international law academics, to make sense of what goes on around them. This helps explain the circular structure of much academic international legal debate: it aims to work through whatever it is that people think they observe. Those people then adopt a vocabulary that may, *prima facie*, seem to suit their observations, only to discover that actually, it is not all that suitable, or that it comes with loads of normative baggage that no one anticipated at the time, or even that the initial observations were not all that accurate really.

So too with international constitutionalism. It kicked off in earnest, arguably, once Tully had compellingly suggested that constitutions could co-exist.[49] Thereafter, people started to think that international and domestic constitutionalism were not mutually exclusive, and that, lo and behold, some international phenomena could perhaps be explained with the help of a constitutional vocabulary - how else to make sense of *jus cogens*? Or *erga omnes* obligations? It is no coincidence that traditional international lawyers, raised on a diet of sovereignty and state consent, were abhorred by these notions, but the new Latin terms seemed amenable to a constitutional discourse, and once such a dicourse was adopted, they seemed to pop up everywhere; which in turn created doubts about the accuracy or usefulness of the observation: if all norms are *jus cogens*, then the concept does little specific work. Moreover, once it was realized that constitutionalism comes with normative connotations, the question quickly arose whether it was needed in the wake of the seeming retreat of globalization and the pragmatic way to solve fragmentation, or whether it was even desirable: classic fears about world government could come to the fore, for it seemed that global constitutionalism was only one step removed from such a spectre.

As a result, the debate died down about as quickly as it had arisen. It dominated the discipline for about a decade, and then fizzed out. Still, some of the

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[49] See James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995).

underlying issues are persistent. There is a movement towards global law[50], including through overlapping legal spaces. There is the need to provide for public and common goods, made crystal clear by climate change, and for this, the traditional existence on sovereignty and state consent seems insufficient, outdated, probably even dangerous. In one form or another then, some of the thoughts underlying constitutionalization are bound to persist or, perhaps, return.

Further reading:

Eyal Benvenisti, *The Law of Global Governance* (The Hague: Hague Academy of International Law, 2014);
Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford University Press, 2009);
Martti Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization', (2007) 8 *Theoretical Inquiries in Law*, 9-36;
Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, 2010);
Eric Stein, 'Lawyers, Judges and the Making of a Transnational Constitution', (1981) 75 *American Journal of Interntional Law*, 1-27;
Neil Walker, *Intimations of Global Law* (Cambridge University Press, 2015).

[50] See Neil Walker, *Intimations of Global Law* (Cambridge University Press, 2015).